Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

INTERNATIONAL HOUSE OF PANCAKES,

Petitioner,

v.

THEODORE A. PINNOCK

and

UNITED STATES OF AMERICA,

Respondents.

Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Americans With Disabilities Act of 1990 ("ADA") was enacted pursuant to Congress' powers under the Commerce Clause and Fourteenth Amendment. The ADA attempts to address the issue of discrimination against individuals with disabilities through direct federal regulation of private businesses instead of through its spending or taxing powers.

The ADA is comprised of separate titles that regulate in areas of employment (Title I), public services (Title II), and public accommodations (Title III). Title III of the ADA establishes federal building code requirements, which apply to private property that is owned or operated by private businesses. In addition, Title III's federal building code requirements apply to construction of new buildings and buildings that were in existence *prior* to enactment of the ADA. Finally, Title III regulates private business practices in the area of public accommodations.

The constitutional challenges presented by this case are limited to Title III of the ADA. The questions presented by this case are:

1. Whether the Commerce Clause is a valid source of power through which Congress may enact federal building code requirements that apply to private property owned or operated by private businesses.

2. Whether Title III violates the Tenth Amendment because it creates federal building code requirements that supersede state and local building and health codes.

QUESTIONS PRESENTED – Continued

3. Whether Title III is retroactive legislation because its building code requirements apply to buildings that were in existence *prior* to enactment of the ADA.

4. Whether Title III's delegation of rule making powers to the executive and judicial branches is so broad and ambiguous that it violates separation of powers principles.

5. Whether Title III's requirements are invalid because they are vague.

6. Whether the requirements placed on private businesses by Title III are invalid because they constitute a taking of private property for public use without just compensation.

PARTIES TO THE PROCEEDING

The United States of America, Theodore A. Pinnock, and Majid Zahedi dba International House of Pancakes (hereinafter "IHOP") were parties in the district court.

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Petition For Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

IHOP petitions for a writ of certiorari before judgment to review the United States District Court for the Southern District of California's order denying IHOP's motion for summary judgment and granting the United States of America's cross-motion for summary judgment. The motions of IHOP and the United States' concerned IHOP's constitutional challenges to Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* (App., *infra,* 52a-58a).

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-34a) is not yet reported. The opinion (as amended on February 2, 1994) can be found through LEXIS at: 1993 U.S. Dist Lexis 16399.

JURISDICTION

On November 17, 1993, the district court certified IHOP's counter-claim for appeal (App., *infra*, 35a-37a) pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. The judgment of the district court (App., *infra*, 38a) was entered on November 24, 1993. The notice of appeal (App., *infra*, 39a-40a) was filed on November 23, 1993. The case was docketed in the court of appeals on January 7, 1994, as No. 94-55030, and on January 24, 1994, the court of appeals set a briefing schedule (App., *infra*, 41a-42a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

Under 28 U.S.C. 1254(1), this Court may grant a petition for writ of certiorari to review any case that is "in" the court of appeals, even if final judgment has not yet been entered by that court. *United States v. Nixon*, 418 U.S. 683, 692 (1974). Even the party that prevailed in the district court may seek review in this Court on a petition for a writ of certiorari before judgment. *Id.* at 686, 690. This case comes within 28 U.S.C. 1254(1) because a notice of appeal has been filed and this case has been properly docketed in the court of appeals. *United States v. Nixon*, 418 U.S. at 692; *Gray v. Ruff*, 292 U.S. 25, 30-31 (1934); see *Dames & Moore v. Regan*, 453 U.S. 654, 667-668 (1981); R.

Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* § 2.3, at 41-43 (7th ed. 1993). Under 28 U.S.C. 2101(e), a petition for writ of certiorari before judgment is timely if it is filed "at any time before judgment."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of Articie I, §§ 1 and 8, Article II, § 1, and Article III, § 1 of the Constitution of the United States, of the Fifth and Tenth Amendments to the Constitution of the United States, and of the Americans With Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* are reproduced at App., *infra*, 52a-58a.

STATEMENT

A. Introduction

This case arises from a dispute between Mr. Pinnock and IHOP regarding the application of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*[1]

The ADA is comprised of separate titles that regulate in the areas of employment (Title I), public services (Title II), and public accommodations (Title III). In this case, Mr.

[1] The Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, shall hereinafter be referred to as the "ADA" and all section citations herein shall refer to sections of the ADA unless otherwise indicated.

Pinnock alleges violations of Title III of the ADA. Accordingly, this case will call upon the Court to decide questions as to the constitutionality of Title III only. As indicated by the district court judge, these questions are ones of first impression (App., *infra*, 2a).

B. Factual Background

Mr. Pinnock resides in San Diego, California and has a physical disability (i.e., cerebral palsy), which has a substantial effect on his abilities to walk and speak. App., *infra*, 44a.

On April 28, 1986, IHOP commenced business as a privately owned and operated restaurant that serves breakfast, lunch, and dinner. App., *infra*, 45a. IHOP is a franchisee of IHOP Corporation, which is a large, international corporation. App., *infra*, 4a. During all times complained of by Mr. Pinnock, all products (i.e., eggs, meat, bread, milk, etc.) that were served at IHOP were purchased within the state of California, to wit: in San Diego and Los Angeles Counties. App., *infra*, 50a.

IHOP's facility is located in the City of San Diego, California, which is within two miles of two interstate highways. App., *infra*, 5a. IHOP's facility was built approximately twenty-five (25) years ago, and, therefore, was in existence *prior* to enactment of the ADA. App., *infra*, 44a-45a.

Since IHOP commenced business in 1986 it had an average of twenty-five employees at any given time. App., *infra*, 45a. At the time of its motion in the district court, IHOP employed twenty-eight employees: ten table-

waiters, six cooks, two hostesses, four busboys, four dishwashers, and two managers. App., *infra*, 45a. Three of IHOP's employees had physical disabilities: one cook did not have use of his right hand and had been working for IHOP for approximately seven years; another employee had problems with physical seizures; and another cook was unable to read or write. App., *infra*, 46a.

During all time frames complained of by Mr. Pinnock, IHOP's staff were trained to assist anyone with a disability and would provide the following assistance to persons with disabilities. IHOP did not have Braille menus but would provide an employee to read the menu to customers with sight or other disabilities. App., *infra*, 46a. IHOP did not have automatic entrance doors but would have an employee open doors for persons with physical disabilities. App., *infra*, 46a. IHOP's employees would rearrange tables in order to accommodate persons confined to wheelchairs. App., *infra*, 47a. Seeing eye dogs and other canines that assist disabled persons were permitted entry to IHOP's facility. App., *infra*, 47a.

During all time frames complained of by Mr. Pinnock, the following improvements to IHOP's facility were in existence: the parking lot had two marked handicapped parking spaces and a wheelchair ramp for access to the front entrance; the front entrance had double doors, which provided access for persons confined to wheelchairs; the dining room was accessible to persons confined to wheelchairs; and the bathrooms had grab bars but were *not* accessible to persons confined to wheelchairs. App., *infra*, 47a-48a.

In order to ascertain how much it would cost to implement the modifications requested by Mr. Pinnock in his complaint, in February, 1993, IHOP procured two construction estimates from a licensed California building contractor, Mr. Dan Souza. App., *infra*, 48a. Mr. Souza was familiar with the Americans with Disabilities Act Accessibility Guidelines For Buildings and Facilities[2] ("ADA Guidelines"); and he had built new facilities and modified existing facilities to comply with the ADA Guidelines. App., *infra*, 48a.

In February, 1993, Mr. Souza inspected the IHOP facility in order to ascertain what modifications would be needed in order to comply with Part 4.23 of the ADA Guidelines. App., *infra*, 49a. He determined that there were two alternative modifications that could be made to IHOP's existing facility in order to comply with Part 4.23 of the ADA Guidelines. App., *infra*, 49a.

One modification would entail relocating an office that was located between the bathrooms for men and women; this alternative would cost **$32,500**. App., *infra*, 49a.

The alternative modification would keep the office between the two bathrooms in place, but would extend the walls in both bathrooms; this alternative would cost

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[2] 28 C.F.R. Part 36, App. A. This document was prepared by the executive branch (i.e., Department of Justice) and is too voluminous to reprint in the appendix of this petition. The ADA Guidelines set forth detailed drawings and specifications regarding Title III's building code requirements. If the Court requests, IHOP will prepare and file a supplemental appendix that includes the drawings and specifications.

$104,580. App., *infra*, 49a. This second modification would have caused IHOP to lose approximately 140 square feet of dining room and work area, which translated into a loss of approximately twenty seating places for customers. App., *infra*, 50a.

Finally, an important and costly consequence of modifying an existing facility is that any modification would trigger the legal requirement to comply with all local and state building and health codes that were adopted *after* an existing facility was built. App., *infra*, 50a.[3]

C. The Statutory Scheme Of The ADA

1. Summary of ADA

The ADA's stated purpose is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." § 12101(b)(1). App., *infra*, 52a. The findings of Congress are that there are **43 million** Americans who have one or more physical or mental disabilities (and that this number is increasing), and that these individuals are discriminated against on a daily basis. § 12101(a). App., *infra*, 52a.

The stated sources of Congressional power are the Commerce Clause and the Fourteenth Amendment. § 12101(b)(4). App., *infra*, 52a.

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[3] It is very important to note that neither the debates in Congress nor the House and Senate reports nor the Conference Reports nor the ADA Guidelines nor the Justice Department's regulations (28 C.F.R., Part 36.101 *et seq.*) addressed this fundamental principle of local and state building and health codes.

Stated generally, the ADA is comprised of the following areas of application: Title I, employment; Title II, public services; Title III, public accommodations; and miscellaneous provisions.

This case focuses on constitutional challenges to Title III (Public Accommodations) of the ADA.

2. Relevant Sections of Title III (Public Accommodations) of the ADA

In this case, the relevant portions of Title III of the ADA are concerned with private business entities that are characterized as **"public accommodations."** Under Section 12181(7)(B), a restaurant is enumerated as a **"public accommodation"** under Title III of the ADA.[4]

Under Title III, persons with disabilities shall not be denied **"full and equal enjoyment"** of the goods, services, privileges, advantages, or accommodations provided by a place of public accommodation. § 12182(a). App., *infra*, 54a.[5] In addition, persons with disabilities shall not be denied the **"opportunity to participate"** in or benefit from accommodations. § 12182(b)(1)(A)-(C). App., *infra*, 54a-55a.

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[4] More accurately, a private restaurant would be characterized as a "public accommodation" under Title III if that restaurant's "operations affect commerce." § 12181(7). App., *infra*, 53a. "Commerce" is defined in § 12181(1). App., *infra*, 53a.

[5] Hereinafter the providing of goods, services, facilities, privileges, advantages, or accommodations of an existing facility shall be collectively referred to as "accommodations."

Title III regulates facilities that were in existence *prior* to enactment of Title III or are new constructions. IHOP's facility was an existing facility because it was in existence **prior** to enactment of the ADA. § 12182(b)(2)(iv). App., *infra*, 56a.

An existing facility must remove all **"architectural barriers"** where such removal is **"readily achievable."** § 12182(b)(2)(iv). App., *infra*, 56a. If removal of such barriers is not **"readily achievable"** then the facility must provide an **"alternative method"** if such **"alterative method"** is **"readily achievable."** § 12182(b)(2)(v). App., *infra*, 56a.

An existing facility must make **"reasonable modifications"** in policies, practices, or procedures in order to afford disabled persons with accommodations unless the modifications would **"fundamentally alter"** the **"nature"** of the accommodations. § 12182(b)(2)(ii). App., *infra*, 55a-56a.

An existing facility must afford disabled persons with accommodations in the **"most integrated setting appropriate."** § 12182(b)(1)(B). App., *infra*, 55a.

An existing facility must provide **"auxiliary aids and services"** to persons with disabilities unless providing same would: (1) **"fundamentally alter"** the **"nature"** of the accommodations or (2) result in an **"undue burden."** § 12182(b)(2)(iii). App., *infra*, 56a.

Section 12186(b) *delegates* power to the executive branch (i.e., Attorney General/Justice Department) to promulgate regulations to carry out the provisions of Title III of the ADA. App., *infra*, 56a.

Finally, §§ 12188 and 12205 are the enforcement provisions of Title III, which provide Mr. Pinnock with a private right to obtain preventive and injunctive relief, and which provide for monetary damages, civil penalties of $50,000 to $100,000, and payment of complaining party's attorneys' fees, litigation expenses, and costs. App., *infra*, 57a-58a.

D. The Proceedings In This Case

On September 9, 1992, Mr. Pinnock filed his complaint in the district court, which alleged violations of Title III of the ADA. App., *infra*, 1a-2a.

On January 19, 1993, IHOP filed its counter-claim for declaratory relief, which requests the Court to declare the ADA and provisions thereof unconstitutional. App., *infra*, 2a. On January 22, 1993, the district court served the U.S. Attorney General with notice of the constitutional challenges to the ADA. Pursuant to Rule 24(a) of the Federal Rules of Civil Procedure and 28 U.S.C. sec. 2403, the United States intervened to defend the constitutionality of the ADA. App., *infra*, 2a.

On May 18, 1993, IHOP filed its motion for summary judgment on the constitutional issues; the government filed a cross-motion for summary judgment. On November 8, 1993, the district court denied IHOP's motion and granted the United States' cross-motion. App., *infra*, 1a-34a.

On November 17, 1993, the district court certified the case for an interlocutory appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. App., *infra*, 35a-37a.

On November 24, 1993, the district court entered judgment on the counter-claim. App., *infra*, 38a.

REASONS FOR GRANTING THE PETITION

A petition for a writ of certiorari before judgment in a case pending in a court of appeals will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 11. This case meets that strict criterion.

1. This Court on several occasions has issued a writ of certiorari before judgment when it was necessary to obtain expeditious resolution of exceptionally important legal questions. For example, the Court issued a writ of certiorari before judgment in *Mistretta v. United States*, 488 U.S. 361 (1989) (federal determinate sentencing guidelines); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (Iran hostage agreement); *United States v. Nixon*, 418 U.S. 683 (1974) (subpoena to the President); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (the steel seizure case); and *Ex parte Quirin*, 317 U.S. 1 (1942) (President's assignment to a military tribunal of jurisdiction over the trial of belligerent saboteurs). See Lindgren & Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup.Ct.Rev. 259. The constitutionality of the Americans with Disabilities Act of 1990 concerns a subject of equal public importance.

The questions presented by this case concern not only whether the source of power exercised by Congress to enact Title III of the ADA was valid, but also whether Congress exercised that power in a manner consistent with the Constitution and Bill of Rights.

For example, one of the most peculiar aspects of Title III of the ADA is that it retroactively applies federal building code requirements to all facilities built *prior* to enactment of the ADA. Consequently, this has the effect of placing all such facilities in violation of Title III, notwithstanding the fact that these facilities were built in compliance with state and local building codes. This, of course, serves to establish a federal building code. There is no escaping that these points raise compelling constitutional questions. For example:

(1) Is the Commerce Clause a valid source of power through which Congress may enact federal building codes that apply to facilities owned or operated by private businesses?

(2) Is Congress' enactment of federal building codes a violation of the Tenth Amendment?

(3) Is it retroactive legislation to apply Title III to buildings that were in existence *prior* to enactment of the ADA?

It is not an overstatement to say that these questions are some of the most important questions that have ever come before this Court regarding federal powers, federal powers in relation to state powers, and federal regulation of private business entities.

Congress has discovered and implemented a new means by which to circumvent the political accountability of enacting tax legislation: it merely creates a regulatory scheme that mandates compliance by private business, which is financed not by taxes but by private businesses. When viewed in its national breadth, the economic impact of the ADA on the national economy and on private businesses is of monumental proportions. For example, in order for it to comply with the ADA, IHOP would be required to expend between $32,500 and $104,580. App., *infra*, 49a.

The dramatic economic impact becomes apparent when these figures are multiplied by the millions of private business facilities throughout the country. These figures, of course, do not include the penalties assessed by the ADA; nor do they include the ADA's requirement that a private business must pay the complaining party's attorneys' fees, litigation expenses, and costs. §§ 12188 and 12205. App., *infra*, 57a-58a.

This case is an appropriate vehicle to settle the disputes raised. First, there are no factual disputes. Second, IHOP is requesting the Court to decide the constitutionality of only Title III of the ADA as it applies to *existing* facilities. Third, the constitutional issues raised by this case can easily be decided without delay or waiting for the development of case law in the courts of appeals.

2. We recognize that the Court normally would prefer to wait until the questions presented by this case have been considered by one or more courts of appeals before granting review. Yet if this Court were to deny review at

this time to await developments in the courts of appeals, the result would be substantial delay in ultimate resolution of the constitutional questions. We submit that the costs of postponing review greatly outweigh the benefits, for several reasons.

First, in his order granting IHOP's request for certification of case for early appeal (App., *infra*, 36a), district court judge John Rhoades determined that IHOP's constitutional challenges were meritorious and recognized the need for an immediate resolution of those issues by an appellate court:

"[IHOP's counter-claim] raises novel challenges to the constitutionality of the Americans With Disabilities Act . . . An early appeal enables the parties to avoid an unnecessary and costly trial . . . The Court finds there is no just reason for delay [of the appeal]."

Second, unless this Court promptly settles the questions of the ADA's constitutionality, the business community not only will suffer from this uncertainty, but also will face the prospect of repetitive litigation, numerous fines and attorneys' fees, and disruption of their businesses.

Third, resolution by this Court of the constitutional challenges will have a stabilizing effect on litigation under the ADA. For example, if this Court determines that Title III of the ADA is constitutional, then the district courts need only concentrate on applying the facts of each case to the law instead of deciding recurring questions of constitutionality.

Fourth, if the Court finds that Title III of the ADA is unconstitutional, then administrative burdens on the district courts will be eliminated at an early stage instead of waiting for years of case law development in the courts of appeals. In addition, billions of dollars will be saved by private businesses because they will not have to pay for compliance with Title III, engage in costly litigation, or pay damages, fines, and attorneys' fees.

Fifth, the constitutional challenges made by IHOP, if resolved in its favor, will have an impact on future congressional legislation. In this regard, this case can create a congressional bench-mark for future legislation.

Sixth, it is likely that this Court will have to address the constitutional questions presented by this case at some point.

Finally, granting review at this time will not deny the Court the time for adequate reflection on the important questions at issue here. Briefing on the merits can proceed at a normal pace during the Court's upcoming summer recess, and argument can be scheduled for the first session during the October 1994 Term. That procedure will enable the parties to present their positions, while allowing the Court the opportunity to carefully consider the merits of the questions presented.

CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

Respectfully submitted.

PETER D. LEPISCOPO
Counsel for Petitioner

APPENDIX A

THEODORE A. PINNOCK

Plaintiff,

v.

INTERNATIONAL HOUSE OF PANCAKES FRANCHISEE, et al.,

Defendants.

MAJID ZAHEDI doing business as INTERNATIONAL HOUSE OF PANCAKES,

Counterclaimant.

v.

THEODORE A. PINNOCK, and DOES 1 THROUGH 50, Counterdefendants, and

THE UNITED STATES OF AMERICA,

Counterdefendant-Intervenor.

CIVIL NO. 92-1370-R (CM)

United States District Court

Southern District

Filed November 8, 1993

I. Background

Plaintiff, Theodore A. Pinnock ("Pinnock") filed the complaint in this action against Defendant, Majid Zahedi, owner of an International House of Pancakes restaurant ("IHOP"). Pinnock, an attorney representing himself, is unable to walk any [sic] uses a wheelchair. Pinnock dined at the defendant's restaurant on June 21, 1992, and then

attempted to use the restroom. The entrance to the restroom, however, was not wide enough to admit his wheelchair. Pinnock therefore, removed himself from his wheelchair and crawled into the restroom. As a result of this encounter, Pinnock alleges nine, causes of action, against IHOP. Five of the causes of action arise under state law, alleging violations of the state health and safety code, the Unruh Civil Rights Act, and infliction of emotion distress. The remaining four causes of action are alleged under the Americans with Disabilities Act of 1990, 42 U.S.C. sec. 12101 *et seq.* ("ADA"), arising from IHOP's alleged failure to comply with the statute' [sic] provisions governing access for disabled individuals in public accommodations ("title III").[2]

IHOP presented twenty-five affirmative defenses in its answer to the complaint. Among these, and at issue here, are allegations that the ADA violates numerous provisions of the United States Constitution. IHOP filed a compulsory counterclaim for Declaratory Judgment on the constitutional challenges pursuant to 28 U.S.C. sec. 1331 and 2201. The United States intervened pursuant to rule 24(a) of the Federal Rules of Civil Procedure and 28 U.S.C. sec. 2403, to defend the constitutionality of the ADA, and filed a cross-motion for summary judgment on the constitutional issues. As no court has yet considered the constitutional challenges raised by IHOP, these motions call upon the Court to decide questions of first impression.

II. IHOP is a Member of an Industry Which Affects Interstate Commerce and is Properly Regulated by Title III.

IHOP argues that Congress does not have constitutional authority to regulate its facility asserting that title III of the ADA exceeds the powers granted Congress by the U.S. Constitution. Congress enacted title III pursuant to Article I, Section 8, of the United States Constitution, which grants Congress the power to "regulate Commerce . . . among the several States" and to enact all laws necessary and proper to this end. U.S. CONST., art. I, sec. 8, cls. 3, 18: *Katzenbach v. McClung*, 379 U.S. 294, 301-02 (1964). The Supreme Court has consistently held that Congress is empowered under the Commerce Clause to regulate not only interstate activities, but also intrastate activities that substantially affect interstate commerce. *See, e.g., McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980); *Perez v. United States*, 402 U.S. 146, 151 (1971) (citing *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)); *Wickard v. Filburn*, 317 U.S. 111, 122-25 (1942); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

The Commerce Clause allows Congress to regulate any entity, regardless of its individual impact on interstate commerce, so long as the entity engages in a class of activities that affects interstate commerce. *Russell v. United States*, 471 U.S. 858, 862 (1985); *Hodel v. Virginia Surface Min. & Reclamation Ass'n*, 452 U.S. 264, 277 (citing *Fry v. United States*, 421 U.S. 542, 547 (1975)); *Perez*, 402 U.S. at 151-54. As the Supreme Court stated in *United States v. Darby*, Congress has "recognized that in present day industry, competition by a small party may affect the

whole and that the total effect of the competition of many small producers may be great." 312 U.S. 100, 123 (1941). *See also Wickard*, 317 U.S. at 128-29.

Courts must defer to congressional findings that an activity affects commerce, so long as there is a rational basis for such a finding. *Hodel*, 452 U.S. at 276; *Katzenbach*, 379 U.S. at 303-04 (1964). As the Supreme Court recognized in the context of racial discrimination, the restaurant industry unquestionably affects interstate commerce in a substantial way. In *Katzenbach*, the Court noted,

> discrimination in restaurants ha[s] a direct and highly restrictive effect upon interstate travel by Negroes. This resulted . . . because discriminatory practices prevent Negroes from buying prepared food served on the premises while on a trip, except in isolated and unkempt restaurants and under most unsatisfactory and often unpleasant conditions. This obviously discourages travel and obstructs interstate commerce for one can hardly travel without eating.

379 U.S. at 300. Thus, regardless of IHOP's individual circumstances, it is subject to Commerce Clause regulation as part of the restaurant industry.

Even aside from its membership in an interstate industry, IHOP demonstrates characteristics which place it squarely in the category of interstate commerce. It is a franchise of a large, international, publicly traded corporation ("IHOP Corp."), organized under Delaware law. IHOP Corp. had total retail sales of $479 million in 1992, operates 547 franchises in thirty-five states, Canada, and Japan, and employs 16,000 persons.[3] Furthermore, IHOP is located directly across the street from State Highway

163, and within two miles of two interstate highways. There are three hotels within walking distance, and three motels within one and one-half miles of the restaurant.[4] The courts have found these facts to be indicia of a business operating in interstate commerce. *See Katzenbach*, 379 U.S. at 127 (restaurant on state highway, 11 blocks from interstate highway, affected commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964) (motel two blocks from downtown road and "readily accessible" to two intrastate and two interstate highways affected commerce); *Miller v. Amusement Enters., Inc.*, 394 F.2d 342, 345 (5th Cir. 1968) (amusement park 150 yards from interstate highway affected commerce).

Congressional enactment of title III of the ADA was well within Congress' power to regulate interstate commerce under the Commerce Clause. As part of the restaurant industry, IHOP is subject to the provisions of title III, which by its own terms, reaches as broadly as the Commerce Clause permits.[5] As a member of the restaurant industry and as an individual enterprise which caters to travelers, IHOP is properly regulated by title III of the ADA.

III. Title III of the ADA is Not Unconstitutionally Vague

IHOP argues that many of the terms used in section 12182(b)(2) of title III are unconstitutionally vague and are therefore in violation of the Due Process Clause of the Fifth Amendment. Statutes which fail to adequately specify the actions or conduct necessary to conform with the law pose problems for which the Supreme Court has

expressed serious concern.[6] However, the terms with which IHOP takes issue do not deprive private businesses of the ability to steer between lawful and unlawful conduct. To the contrary, the statute, its preamble, the legislative history, and the accompanying guidelines provide more than ample explanation of the statute's application.

A. Statutes Regulating Commercial Activity are Subject to Lower Standards of Specificity

Vagueness challenges are considered under varying standards, depending upon the nature of the statute. Statutes which threaten to inhibit freedom of speech or other constitutionally protected rights face a more stringent vagueness test. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 & n.7 (1982); *Baggett v. Bullitt*, 377 U.S. 360 (1964). Criminal statutes in general face a higher vagueness standard than do civil statutes: "The Court has . . . expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Hoffman Estates*, 455 U.S. at 499. *See Winters v. New York*, 333 U.S. 507, 515 (1948) (where a statute imposes criminal penalties, the standard of certainly is higher).[7]

By contrast, purely economic regulations are subject to lower standards of specificity. In *Hoffman Estates*, the Supreme Court held that:

> [E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which

> face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. . . . Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.

455 U.S. at 498; *see also Grayned*, 408 U.S. at 109 (1972); *Chalmers v. City of Los Angeles*, 762 F.2d 753, 757 (9th Cir. 1985).

Title III of the ADA is a civil statute regulating commercial conduct.[8] As such, IHOP can successfully sustain its challenge only if it can prove that the enactment specifies "no standard of conduct . . . at all." *Hoffman Estates*, 455 U.S. at 489 & n.7. *See also Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (invalidating criminal statute found to be vague "not in the sense that it requires a person to confirm his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."); *Boutilier v. Immigration and Naturalization Services*, 387 U.S. 118, 121 (1967) (to violate due process, a statute must be "so vague and indefinite as really to be no rule or standard at all").

B. Limiting Constructions Offered by the Department of Justice are Properly Considered

In evaluating a vagueness challenge, a court should consider the words of the ordinance, interpretations given to analogous statutes, and "the interpretation of the statute given by those charged with enforcing it." *Grayned*, 408 U.S. at 110. *See also Hoffman Estates*, 455 U.S. at

n.5 (in reviewing a statute for vagueness, a federal court must consider limiting constructions proffered by an enforcing agency.); *Ward v. Rock Against Racism*, 491 U.S. 781, 795 (1989) (same). Administrative regulations and interpretations may provide sufficient clarification for statues that might otherwise be deemed vague. *United States v. Schneiderman*, 968 F.2d 1564, 1568 (2d Cir. 1992), *cert denied*, 113 S. Ct. 1283 (1993); *see, e.g., Hoffman Estate*, 455 U.S. at 502, 504; *Fleming v. USDA*, 713 F.2d 179, 194 (6th Cir. 1983).

IHOP argues that the limiting constructions offered by the Department of Justice should not be considered when examining the statute for vagueness because none of the cases cited by the Government involve federal statutes. While it is true that the provisions considered in *Grayned, Hoffman Estates*, and *Ward* were state or municipal statutes rather than federal statutes, IHOP has offered no basis for differentiating between state and federal statutes in this context. There is no language in either *Grayned, Hoffman Estates* or *Ward* indicating that the Supreme Court intended to exclude federal statutes from the benefit of limiting constructions. Furthermore, such a distinction is contrary to reason; when federal and state statutes are challenged on the same constitutional grounds, they should be held to the same standard. The reason for applying limiting constructions to state statutes apply with equal force to federal statutes. Therefore, the limiting constructions offered by the Department of Justice and the title III Technical Assistance Manual, which are available to the public, are properly considered.

C. Each of the Challenged Terms, When Considered in Conjunction With Limiting Constructions, is Sufficiently Precise

In *Grayned*, the Supreme Court upheld a challenged statute that was "marked by 'flexibility and reasonable breadth, rather than meticulous specificity' " [sic] noting that "we can never expect mathematical certainty from our language." 408 U.S. at 110. Likewise, the terms of title III are marked by well-reasoned flexibility and breadth. When considered in conjunction with the Department of Justice guidelines, these terms are not unconstitutionally vague.

1. Readily Achievable Barrier Removal

Title III requires existing places of public accommodation to remove architectural barriers to access, where such removal is "readily achievable." 42 U.S.C. sec. 12182(b)(2)(A)(iv) (Supp. II 1990). The term is defined in the statute as "easily accomplishable and able to be carried out without much difficulty or expense."42 U.S.C. sec. 12181(9) (Supp. II 1990). The statute enumerates four factors to consider when determining whether a modification is readily achievable, and the legislative history lists examples of the types of changes Congress believes are readily achievable. These include specific examples for small stores and restaurants such as rearranging tables and chairs and installing small ramps and grab bars in restrooms. *See* U.S. Mem. in Support of Cross Mot. for Sum. J. at n.27 (citing 42 U.S.C. sec. 12181(9) (Supp. II 1990)).

In addition, the federal regulation further elucidates the term "readily achievable" by adding other factors. These include the overall financial resources of the parent corporation and safety requirements, 28 C.F.R. sec. 36.104, at 460-61 (1991). The regulation lists 21 examples of barrier removal likely to be "readily achievable" in many circumstances, such as installing ramps and repositioning shelves and telephones. *See id.* sec. 36.304(b), at 466 & app. B. at 576-77.

Finally, the preamble to the regulation provides further explanation and notes that use of a more specific standard would contravene the goals of the ADA:

> the Department has declined to establish in the final rule any kind of numerical formula for determining whether an action is readily achievable. It would be difficult to devise a specific ceiling on compliance costs that would take into account the vast diversity of enterprises covered by the ADA's public accommodation requirements and the economic situations that any particular entity would find itself in at any moment.

Id. at sec. 36.104, app. B. at 577.

These specifications easily met the requirements for economic regulation announced in *Hoffman Estates.*

2. Alternatives to Barrier Removal

Title III provides that where barrier removal is not readily achievable, a covered entity must make it goods or services available through "alternative methods if such methods are readily achievable." 42 U.S.C. sec. 12182(b)(2)(A)(v) (Supp. II. 1990). The legislative history, the regulation itself, and the preamble all provide specific examples of appropriate alternatives to barrier removal. These include providing curb service or home delivery, coming to the door of the facility to handle transactions, serving beverages at a table for persons with disabilities where a bar is inaccessible, providing assistance to retrieve items from inaccessible shelves, and relocating services and activities to accessible locations.

Senate Report at 66; C.F.R. sec. 36.305(b), at 467-68, app. B. at 599 (1991). These provisions also meet the specificity requirements for economic regulations.

3. Reasonable Modifications of Policies and Procedures

The statute requires public accommodations to:

> make reasonable modifications in policies, practices or procedures, when such modifications are necessary to afford such goods, services . . . to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

42 U.S.C. sec. 12182(b)(2)(A)(ii) (Supp. II 1990), IHOP argues that the phrases "reasonable modifications" and "fundamentally alter" are unconstitutionally vague.

Illustrations of the term "reasonable modifications" are provided in the title III regulation and its preamble. For example, stores in which all of the checkout aisles are not accessible are required to ensure that an adequate number of accessible checkout aisles are left open at all times. *See* 28 C.F.R. sec. 39302(d), at 465 (1991). Likewise, facilities that do not permit entry to animals would be required to modify such policies as they apply to service animals accompanying disabled individuals. *Id.* sec. 36.306(c) at 465.

The preamble to the title III regulation contains a lengthy explanation of the concept of fundamental alteration, and explains that the "rule does not require modifications to the legitimate areas of specialization of service providers." 28 C.F.R. pt. 36, app. B. at 592 (1991). The preamble also provides an example of an acceptable referral to another provider who specializes in a requested service. *Id.*

Furthermore, as the Government points out, the term "fundamentally alter" has been previously used in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). That decision, construed section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability in federally assisted or operated programs or activities. In *Davis*, the Court concluded that programs did not discriminate if they failed to make accommodations that would "fundamentally alter" the nature of the program. *Id.* at 409. The terms "reasonable modifications"

and "fundamental alteration" are therefore not unconstitutionally vague.

4. Most Integrated Setting Appropriate

Title III requires a covered entities to afford their goods and services to an individual with a disability "in the most integrated setting appropriate to the needs of the individual." 42 U.S.C. sec. 12182(b)(1)(B) (Supp. II 1990). The preamble to the title III regulation provides two pages of examples and explanations illustrating the meaning of this provision. One example provides that it would be a violation of this provision to require persons with mental disabilities to eat in the back room of a restaurant or to refuse to allow a person with a disability to full use of a health spa because of stereotypes about the person's ability to participate. 28 C.F.R. pt. 26, app. B. at 581. The legislative history provides further illustration, noting that the "integrated settings" provision is intended to prevent segregation based on fears and stereotypes about persons with disabilities. H.R. Rep. No. 485, 101st Cong., 2d Sess. pt. II, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 327, 385 ("House Report Pt. II"); *see also id.* pt. III, at 56-57 (1990) reprinted in 1990 U.S.C.C.A.N. 327, 479-90 ("House report. Pt. III"). The term "most integrated setting appropriate," as used in title III, is not unconstitutionally vague.

5. Undue Burden

Under title III, public accommodations are required to provide auxiliary aids in order to extend their services

to persons with disabilities, unless to do so would pose an "undue burden" to the covered entity or would "fundamentally alter" the nature of its goods or services 42 U.S.C. sec. 12181(b)(2)(A)(iii) (Supp. II 1990). The term "undue burden" is defined in the regulations as a "sigificant difficulty or expense." 28 C.F.R. sec. 36.104 at 461 (1991) (definition of "undue burden"). The regulation lists factors for determining whether a particular action will create an undue burden. These are the same factors as those provided for assessing whether an action is "readily achievable." *Id.* The preamble, however, clarifies that:

> "[R]eadily achievable" is a lower standard than "undue burden" in that it requires a lower level of effort on the part of the public accommodation . . . [A] public accommodation is not required to provide any particular aid or service that would result in either a fundamental alteration in the nature of the goods, services, facilities, privileges, advantages, or accommodations offered or in an undue burden. Both of these statutory limitations are derived from case law under section 504 of the Rehabilitation Act of 1973] and are to be applied on a case-by-case basis . . .

Id., app. B. 576, 595 (discussing definition of "undue burden" in sec. 36.104). Furthermore, the regulation is supplemented by discussion in the Technical Assistance Manual, which provides explanations of both "undue burden" and "fundamental alteration." *See* U.S. Depart. of Justice, The Americans with Disabilities Act – Title III Technical Assistance Manual at 27 - 28 (1992 & Supp. 1993).

6. Full and Equal Enjoyment and Opportunity to Participate.

Title III's general prohibition against discrimination provides as follows:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment c [sic] the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. . . .

42 U.S.C. sec. 12182(a) (Supp. II 1990). IHOP claims that the phrase "full and equal enjoyment" is impermissibly vague. However, the next subsection of the statute, entitled "Construction" enumerates categories of actions that constitute such discrimination. These categories include denying a person with a disability public accommodations, or providing accommodations not equal to that afforded to other individuals.

Furthermore, the legislative history explains that

> [f]ull and equal enjoyment does not encompass the notion that persons with disabilities must achieve the identical result or level of achievement of nondisabled persons, but does mean that persons with disabilities must be afforded equal opportunity to obtain the same result.

Senate Report at 60. Thus, the terms "full and equal enjoyment" are given ample operational definition as are the specific subsections of this provision that IHOP challenges. As the government argues the prohibition denying individuals with disabilities an "opportunity to participate in or benefit from" the goods or services of a

covered entity clearly means that persons with disabilities may not be excluded from receiving the services of a place of public accommodation.

IV. Title III is Not Retroactive Legislation

IHOP challenges the ADA on the grounds that it is retroactive legislation and therefore violates the Due Process Clause of the Fifth Amendment. IHOP takes issue with the Government's failure to distinguish *Campbell v. Holt*, 115 U.S. 629 (1885) and *Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935). However, as the Government notes, the Court more recently addressed the issue of retroactivity in *Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84 (1958), *reh'g denied*, 358 U.S. 937 (1959). In that case, the Court rejected due process challenge to a statute which directed the Federal Housing Administration ("FHA") to insure mortgages only for strictly residential housing, rather than transient housing which had been previously included. The Court held that application of the statute to an existing apartment facility which no longer qualified for mortgages under the new law did not contravene the Due Process Clause. In holding that the amended statute was only prospective in effect the Court states:

> [F]ederal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it.

358 U.S. at 91 (quoting *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947)). *See also United States v. Manufacturers Nat'l Bank*, 363 U.S. 194, 200 (1960).

The fact that title III applies to existing places of public accommodation does not render the statute retroactive. Congress routinely acts to regulate existing businesses, programs, and structures, imposing new guidelines which reflect the changing social and environmental standards of our democratic system. The fact that such legislation affects existing entities does not insulate responsible parties from compliance with the law.

The relevant inquiry is whether the legislation imposes liability or penalty for conduct occurring prior to the effective date of the statute. "The determination of whether statute's application in a particular situation is prospective or retroactive depends upon whether the conduct that allegedly triggers the statute's application occurs before or after the law's effective date." *McAndrews v. Fleet Bank*, 989 F.2d 13, 16 (1st Cir. 1993); *see also, FDIC v. Faulkner*, 991 F.2d 262 (5th Cir. 1993); *reh'g denied*, June 30, 1993 WL. The ADA provided a 18 month notice period in which businesses could comply with the Act's requirements and no liability was imposed prior to the end of that period. *See* 42 U.S.C. sec. 12181 note (Supp. II 1990). Small businesses were given an even lengthier notice period. *Id.* Pinnock's complaint was not filed until September 9, 1992, nearly two years after the ADA was passed on July 26, 1990. The requirements of the title III do not subject IHOP to retroactive legislation.

V. Promulgation by the Attorney General's Office of Regulation, Implementing the Provisions of Title III of the ADA is not an Unconstitutional Delegation of Authority by Congress.

IHOP argues that ADA represents an unconstitutional delegation of legislative authority to the executive and judicial branches. Article I, section I, of the U.S. Constitution vests the legislative powers in Congress. Broad delegation of that power violates the Constitution's separation of powers between the branches of government. *See generally* James Madison, The Federalist, No. 47, 244 (1788) (Bantam Books 1982).

While the non-delegation doctrine is an important limitation upon congressional powers, it has rarely been invoked by the courts to invalidate legislation. The Supreme Court first applied the doctrine in two related cases involving depression-era legislation: *A.L.A. Schecter Corp. v. United States*, 295 U.S. 495 (1935) and *Panama Refining Co. v. Ryan*, 293 U.S. 399 (1934). Since that time, however, the rule against delegation of legislative power has "yielded to the growing necessity for delegation to boards and officers of a large measure of discretionary power which is ordinarily considered legislative in character." B.E. Witkin, 7 Constitutional Law sec. 129 (9th ed. 1988). *See also* Harold I. Abramson, "A Fifth Branch of Government: The Private Regulators and Their Constitutionality," 16 Hastings Const. L.Q. 165 (1989).

In *Touby v. United States*, the Court recently reiterated the standard governing delegation, holding that so long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act]

is directed to conform, such legislative action is not a forbidden delegation of legislative power." 111 S.Ct. 1752, 1756 (1991) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 409 (1928)). *See also American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (delegation) is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."). As illustrated below, title III meets the "intelligible principle test."

IHOP claims that language in section 12186 (b) of title III renders the ADA unconstitutional. This section states:

> Not later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter not referred to in subsection (a) of this section that include standards applicable to facilities and vehicles covered under section 12182 of this title.

42 U.S.C. sec. 12186(b) (Supp. II 1990). In instructing the Attorney General to issue regulations, this section explicitly incorporates provisions; set forth in the remainder of the title. As the Government points out, the substance of these provision – provide important guidelines for the requested regulations.

For example, the statute guides the Attorney General by defining who is to be considered an individual with a disability under the Act,[9] 2) listing the categories of entities subject to title III as well as those that are exempt,[10] 3) specifying in detail the conduct that will violate the statute,[11] and 4) setting forth the means for enforcement

including the types of relief to be afforded.[12] These guidelines provide a clear delineation of congressional policy, and easily satisfy the intelligible principle requirement.

Both *Schecter Corp.* and *Panama Refining Co.* are distinguishable from this case. Both these cases addressed the passage of a drastic depression-era act entitled the National Industrial Recovery Act of 1933 ("NIRA"). In *Panama Refining Co.*, the Court invalidated section 9(c) of NIRA which authorized the executive branch to prohibit the transportation of petroleum in interstate and foreign commerce. The statute failed to provide any guidelines or to articulate any policy regarding the circumstances or conditions under which the executive branch could exercise this prohibitive authority. The Court found that the bald delegation of power exceeded Congress's authority under Article I.

Similarly, in *Schecter Corp.*, the Court addressed section 3(a) of NIRA, which empowered the President to promulgate "code of fair competition." This broad grant of power essentially transformed the executive branch into a legislative body, providing the President with no guidance as to the standards embodied in "fair competition" or even specifying which areas of trade were to be addressed. The Court found that such a broad delegation of unlimited discretion in pursuit of an objective as vague as "fair competition" violated the division of powers embodied in the Constitution.

IHOP argues that several of the cases cited by the Government do not apply in this instance because in

those cases Congress set numerical limits for the delegated regulations. However, those cases all involved regulations which were by nature quantitative, and therefore can be distinguished from the ADA. For example, in *Mistretta v. United States*, 488 U.S. 361 (1989), the Supreme Court upheld Congress' delegation of authority to establish sentencing guidelines under the Sentencing Reform Act ("SRA"). The SRA provided maximum sentencing guidelines for the commission. Sentencing guidelines are necessarily quantitative, however, while modifications to public accommodations to provide access for the disabled are not. In fact, as the Government argues, the adoption and imposition of inflexible quantitative guidelines under the ADA would inevitably lead to incongruous and unjust results. Rather, Congress instructed the executive branch to pass regulations achieving specified results, such as access to restrooms, and left the process of determining how best to reach these results to the Department of Justice.

Similarly, in *Yakus v. United States*, 321 U.S. 414 (1944), a case the Court relief on in *Mistretta*, the Court upheld the Emergency Price Control Act's delegation of authority to the Administrator to "promulgate regulations fixing prices of commodities which 'in his judgment will be generally fair and equitable and will effectuate the purposes of th[e] Act.' " *Yakus*, at 420. The Court held that "[i]t is no objection [that such determinations] . . . call for the exercise of judgment, and of the formulation of subsidiary administrative policy within the prescribed statutory framework." *Id.* at 425. IHOP argues

that *Yakus* is distinguishable because Congress set a specific maximum rate for the tariffs, implying that such quantitative directive are necessary to preserve the ADA from challenge. As in *Mistretta*, however, Congress was acting in an area that was purely quantative. Guidelines of such a nature cannot be readily applied to regulations such as those required under the ADA.

Perhaps most significantly, this Court is bound by the recent holding by the Ninth Circuit in *Railway Labor Executives' Assn. v. Skinner*, 934 F.2d 1096, 1100 (9th Cir. 1991). There the appellate court ruled that the Secretary of Transportation's promulgation of drug testing regulations did not result from an unconstitutional delegation of power when that rulemaking authority was derived only from a statutory directive to promulgate "appropriate rules" regulations, orders and standards for all areas of railroad safety." Such rules are closely analogous to the regulations promulgated under the ADA. Both set forth clear objectives (railroad safety and access for the disabled) and request that the executive branch set guidelines fulfilling those rules. Such guidelines are necessarily detailed, and therefore appropriate for promulgated by any agency rather than Congress[13] As the Supreme Court noted in *American Power & Light Company v. Securities & Exchange Comm'n*, "the judicial approval accorded . . . 'broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems . . . " 329 U.S. 90, 96 (1946).

VI. Requiring Alterations to Property in Compliance with Title III of the ADA Is Not an Unconstitutional Taking Without Just Compensation.

IHOP, contends that the expenditure of funds necessary to make the restrooms in its facility accessible to individuals in wheelchairs, if required under the ADA, would constitute a taking of private property "for public use without just compensation" in violation of the Fifth Amendment's Due Process Clause. In *Lucas v. South Carolina Costal* [sic] *Council*, ___ U.S. ___; 112 S.Ct. 2886, (1992) the Supreme Court delineated three situations in which a governmental restraint is considered a taking, therefore requiring compensation. These three situations are: 1) When the regulation compels a permanent physical invasion of the property; 2) When the regulation denies an owner all economically beneficial or productive use of its land; 3) When the regulation in question does not substantially advance a legitimate governmental objective. If either of the first two situations occur, the regulation will be considered a taking regardless of whether the action achieves an important public benefit or has only minimal impact on the owner. *Lucas*, 112 S.Ct. at 2893. The expenditure of funds required by title III does not constitute a taking under the Fifth Amendment as defined in *Lucas*.

A. Requiring IHOP to Comply With the ADA Does Not Constitute a Physical Invasion its Property.

The Fifth Amendment provides that private property may not be taken for public use without just compensation. A cornerstone of the law of takings is that if a

regulation as the effect of establishing a permanent physical occupation, it will be a taking. *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987) (requiring the granting of an easement as a condition to rebuild a home is a taking). An invasion will constitute a taking even if the amount taken is insubstantial. *Loretto v. Telepromper* [sic] *Manhattan CATV*, 458 U.S. 419, 430 (1982). The *Loretto* Court noted that:

> [W]hen the "character of the governmental action" is a permanent physical occupation of the property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit, or has only minimal economic impact on the owner.

Id. at 434. Therefore, when a law results in a permanent physical occupation of property, the government must compensate the landowner.

IHOP argues that the remodeling required under the ADA may result in the loss of as many as 20 seating places in its restaurant. IHOP cites *Loretto* in support of its argument that a regulation which requires a restaurant to widen restrooms and thereby restricts the use of part of its property, violates the Fifth Amendment. IHOP, however, provides an inaccurate recitation of *Loretto*. The Supreme Court's analysis in *Loretto* rests on the finding that a regulation which gives an outside entity the right to physically intrude upon the property is actually the granting of an easement without compensation, which can constitute a taking. In *Loretto*, the Supreme Court found that a statute requiring a landlord to permit a cable

television company to install cable television on his property constituted a taking. This case, however, does not involve the granting of IHOP' [sic] property to another party for its own exclusive use and profit. Rather, the ADA merely proscribes IHOP's use of part of its own property and it therefore could be likened to a zoning regulation. Since the ADA merely regulates the use of property and does not give anyone physical occupation of IHOP's property, it is not within the Supreme Court's first category of takings.

B. THE ADA Does not Deny IHOP ALL Economically Beneficial or Productive Use of Its Land.

Regulations which restrict the use of property will be upheld unless the economic impact of a challenged statute is so extreme that it denies the claimant any economically viable use of the property. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (the denial of a permit to fill in a wetland does not constitute a taking); *Lai v. City and County of Honolulu*, 841 F.2d 301, 303 (9th Cir. 1988) (no taking found even when creation of scenic easement prevented construction of a high-rise condominium). Perhaps the *Lucas* Court provided the clearest justification for this rule when it stated:

> [the] total deprivation of beneficial use is, from the landowner's point of view, the equilavent [sic] of a physical appropriation.

Lucas, 112 S.Ct. at 2894. IHOP does not, however, claim that the ADA would deny it all economic use of its property. To the contrary, IHOP claims only that expenditures may be necessary to comply with the regulation.

Importantly, the ADA was specifically drafted to protect existing businesses from undue hardship. By adopting a "readily achievable" standard. Congress ensured that a business's obligation to remove barriers would reflect its ability to do so. As the Government states, barrier removal which would in fact have a dramatic deleterious effect on IHOP's business would not be required under the "readily achievable" standard. U.S. Mem. in Support of Cross Mot. for Sum. J. at 43.

The remodeling which IHOP claims is required under the ADA regulations could result in the loss of approximately 20 seating places in IHOP's restaurant. The mere loss of approximately 20 seating places surely will not deny IHOP all economically viable use of its property.

The Court must also consider whether the requirements of the statute frustrate the property owner's reasonable investment backed expectations. As discussed above, the ADA was specifically drafted to avoid the imposition of economic hardship upon the operators of public accommodations, particularly those running smaller operations. A showing of frustration of investment-backed expectation is a very difficult one to make, and the impact of the ADA's barrier removal requirements pales in comparison to many of the regulations which the Supreme Court has upheld. In *Andrus v. Allard*, 444 U.S. 51 (1979), the Supreme Court held that federal laws which prohibited sale of articles made from feathers of protected birds did not violate Fifth Amendment, even where laws prohibited all of the uses originally intended for the products. The Court in *Andrus* noted:

> loss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to rest a takings claim . . . [p]erhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as a less compelling than other property-related interests.

Andrus, 444 U.S. at 66. Regulations have been upheld even where they resulted in a complete restriction upon a specific individual's future exploitation of the property for profit. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) (restriction upon removal of coal did not completely destroy value of owner's economic interest in coal).

C. The Statutory Requirements of Title III Substantially Advance a Legitimate Governmental Interest.

A taking occurs when a court finds that there is no evidence that property restrictions will further the stated rationale of a statute. *Nollan*, 483 U.S. at 838. In *Nollan*, the Court found that by requiring an owner who wished to build beach front property to grant a public easement across the property, the California Coastal Commission had taken his property without just compensation. The Court used a means/end analysis to determine if there was a close "fit" between the restriction and the interests aimed to be advanced. *Nollan*, 483 U.S. at 838. The Court decided that requiring the property owner to grant an easement failed the means/ends analysis because there was no relation between the statute and its stated aim, which was to alleviate the effect the homes would have on the view of the beach from the public thoroughfare.

See also Commercial Builders v. Sacramento, 941 F.2d 872 (9th Cir. 1991) (ordinance, requiring the payment of a fee before being granted a non-residential building permit was held not to be an unconstitutional taking because there was nexus between the regulation and the problem to be addressed).

In contrast, the barrier removal requirements of title III clearly forward the stated objectives of the ADA. The ADA aims:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; [and]
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

42 U.S.C. sec. 12101 (b)(1) & (2) (Supp. II 1990). The legislative history of the Act reflects congressional concern over the deleterious effects of discrimination against people with disabilities:

> The large majority of people with disabilities do not go to movies, do not go to the theater, do not go to see musical performances, and do not go to sports events. A substantial minority of persons with disabilities never go to a restaurant, never go to a grocery store, and never go to a church or synagogue. . . . The extent of nonparticipation of individuals with disabilities in social and recreational activities [is] alarming.

Senate Report at 11 (citing the findings of a recent Lou Harris poll summarized by the National Council on Disability). Congress found that the exclusion of disabled

individuals from public life was largely a result of the "lack of physical access to facilities." Senate Report at 11. As a result, the legislative body elected to adopt the barrier removal requirements embodied in title III. These requirements directly address and remedy the problems which the Act aims to redress.

VII. Title III does not Intrude Upon State Sovereignty In Violation of the Tenth Amendment

IHOP argues that the ADA constitutes a "national building code" which trespasses the regulatory area reserved to the states by the Tenth Amendment. It was once contended that the federal government had no police power, as such, except in the District of Columbia. It is now the law, however, that the federal government's implied powers under the "necessary and proper clause" of the Constitution (Art. I, sec. 8) provide for the passage of laws similar to legislation enacted by a state under its police power. Hence, it is recognized today that "in the exercise of its control over interstate commerce, the means employed by the Congress may have the quality of police regulations." *Kentucky Whip & Collar Co. v. Illinois Cen. R. Co.* 299 U.S. 334 (1936). *See also* B.E. Witkin, 8 Constitutional Law sec. 788 (9th ed. 1988).

The Tenth Amendment does not insulate states from federal regulation simply because the regulation affects an area traditionally subject to state control. *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985). Rather, the Court has held that neither the Tenth Amendment nor the structure of the federal system justifies restriction of Congress's [sic] power to apply

otherwise valid commercial regulation to state or local governments. In *Garcia*, the Supreme Court found

> unsound in principle and unworkable in practice a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional."

469 U.S. at 546-47. Instead, the Court emphasized that the Tenth Amendment's primary protection lies in its limitation on the federal legislative process, which protects the sovereignty of states by "the built-in restraints that our system provides through state participation in federal governmental action." *Id.* at 556.

Likewise, in *South Carolina v. Baker*, the Court ruled that Congress's removal of a federal tax exemption for interest earned on state and local government bonds did not violate the Tenth Amendment 485 U.S. 505, 512 (1988). Rejecting South Carolina's substantive analysis, the Court said, "States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable activity." *Id.* at 512.

The Tenth Amendment protects the states from federal laws which "commandee[r] the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States*, 112 S.Ct. 2408 2420 (1992) (citing *Hodel*, 452 U.S. at 288). In *New York*, the Supreme Court ruled that certain provisions of the Federal Low-Level Radioactive Waste Policy Act were unconstitutional because they required the states to choose between either "accepting ownership

of [radioactive] waste or regulating according to the instruction of Congress." *New York*, 112 S.Ct at 2428. The Court found that such a requirement presented "no choice at all." *Id.*

By contrast, title III's statutory scheme does not displace local building codes. It is a federal civil rights act that sets forth accessibility standards that places of public accommodation and commercial facilities must follow. Departures from the ADA Standards are expressly permitted where "alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility." 28 C.F.R. pt. 36, app. A, sec. 2.2 at 482 (1991). State and local building codes remain in effect to be enforced by state officials. State officials are not required to adopt or enforce the ADA Standards for Accessible Design.

VIII. Conclusion

The Court notes that many of IHOP's arguments raise point which have been sympathetically received by organizations and individuals outside the judicial system. As IHOP's brief illustrates, the public has grown increasingly weary of regulations which burden businesses and the court system with uncertain requirements. A district court, however, is limited to considering the constitutionality of the challenged regulations, rather than their political or economic desirability. Although members of the judiciary have occasionally taken forays into the political arena. I agree with Justice Frankfurter, who once

noted: "The Framers carefully and with deliberate forethought refused to so enthrone the judiciary." *Baker v. Carr*, 369 U.S. 186, 270 (1962) (dissenting opinion.

Having carefully considered each of IHOP's constitutional challenges, it is clear that none of these challenges can prevail. The United States cross-motion for summary judgment is granted. IHOP's motion for summary judgment is denied, and IHOP's counterclaim is dismissed. IT IS SO ORDERED.

JOHN S. RHOADES: SR.
UNITED STATES DISTRICT JUDGE

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[1] The Court's Amended Order is issued for purposes of publication and shall be entered nunc pro tunc.

[2] The ADA is comprised of separate titles that regulate in the areas of employment (title I), Public Services (title II), an [sic] Public Accommodations (title III). Title III governs private businesses which meet the characteristics of a public accommodation as specified in section 12181(7) of the ADA. *See* 4; U.S.C. sec. 12181(7).

[3] *See* IHOP Corp. 1992 Annual Report, 2-3, 8.

[4] *See* Declaration of Sean M. Flynn ("Flynn Declaration") attached as Exhibit D, para 9-12.

[5] Title III covers, inter alia, "public accommodations," which are defined by a list of type of facilities whose operations "affect commerce." 42 U.S.C. sec. 12181(7) (Supp. II 1990). In addition, the ADA's statement of purpose states that it intends "to invoke the sweep of congressional authority, including the power . . . to regulate commerce." *Id.* sec. 12101(b)(4).

[6] *See Grayned v. City of Rockford*, 408 U.S. 104, 108-105 [sic] (1972).

[7] The Court has noted that the primary rationale for imposing stricter standards upon criminal statutes is

> not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern law enforcement. . . . Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

Kolender v. Lawson, 461 U.S. 352, 358 (citing *Smith v. Goguen*, 415 U.S. 566 (1974)). The Court found that the statute at issue in that case "vest[ed] virtually complete discretion in the hands of the police. . . . " *Id.* Title III, by contrast, poses no such threat as the ADA is not enforced as a criminal statute.

[8] IHOP argues that title III should be subjected to the higher standards of specificity which apply to "quasi-criminal" statutes because the statute authorizes imposition of up to $50,000 in civil penalties. IHOP states no authority for this proposition. In Hoffman Estates, the Court emphasized that the ordinance "simply regulates business behavior," but found, nonetheless, that the challenged language was sufficiently clear under the more stringent test appropriate to either a quasi-criminal or a criminal law. The Hoffman Estates Court considered the ordinance under the "quasi-criminal" standard due to the fact that the proponents of the statute had taken the position that the ordinance was "quasi-criminal." The ordinance regulated the sale of drug paraphernalia and required purchasers to register their names. 455 U.S. at n.16.

[9] *See* 42 U.S.C. sec. 12102(2) (Supp. II 1990).

[10] *See* 42 U.S.C. sec. 12181(2), (7) & 12187 (Supp. II 1990).

[11] *See* 42 U.S.C. sec. 12182 (Supp. II 1990).

[12] *See* 42 U.S.C. sec. 12188 (supp. II 1990).

[13] As the Government has argued, administrative rulemaking is particularly, suitable for the complex task of gathering and analyzing the necessary facts to develop more specific rules. Prior to issuing the regulations implementing title III to Department of Justice held four public hearings across the nations at which 329 persons testified, 56 Fed. Reg. 35.5444 (1991), addition, the Department solicited comments through its rulemaking process, and received hundreds of comments containing over 10,000 pages of information. *Id.* The

Department reviewed all of these comments and took them into account in formulating the final regulation. *Id.* at 35,545. The Supreme Court has recognized that it is exactly these types of "intricate, labor-intensive task[s]" that are particularly appropriate for delegation. *Mistretta*, 488 U.S. at 379.

Counsel for the United States:
Joseph Russo
U.S. Department of Justice
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Washington, DC 20035-6738
(filed July 27, 1993)

Counsel for defendant, International House of Pancakes Franchisee, Majid Zahedi:
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(filed May 18, 1993)

Plaintiff:
Theodore A. Pinnock, Esq.
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APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THEODORE A. PINNOCK Plaintiff, v. INTERNATIONAL HOUSE OF PANCAKES FRANCHISEE, et al., Defendants.	CIVIL NO. 92-1370-R (CM) ORDER GRANTING DEFENDANT'S MOTION TO CERTIFY CLAIM FOR APPEAL (Filed Nov. 17, 1993)

On November 8, 1993, this Court granted a cross-motion for summary judgment by the United States on the Constitutional Challenges raised by Defendant MAJID ZAHEDI, doing business as INTERNATIONAL HOUSE OF PANCAKES. On November 15, 1993, Defendant filed a motion requesting certification for appeal. While Defendant's motion was brought under section 1292(b), Title 28, of the United States Code, this Court has determined that certification for appeal in this matter is property [sic] granted under Rule 54(b). Rule 54(b) provides that:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is

> no just reason for delay and upon an express direction for entry of judgment.

Fed. R. Civ. P. 54(b).

The counterclaim at issue in this matter raises novel challenges to the constitutionality of the Americans With Disabilities Act. The counterclaim involves separate and independent legal theories. As the counterclaim does not involve any of the issues remaining for adjudication in this matter, there is no possibility that certification of this claim will present the Court of Appeals with duplicative appeals. Furthermore, a reversal of this Court's determination will render a trial of the plaintiff's underlying claims against Defendant moot. An early appeal of the counterclaim therefore enables the parties to avoid an unnecessary and costly trial. Given the relationship between the adjudicated and the unadjudicated claims in this matter, the Court finds that there is no just reason for delay.

For the foregoing reasons and for good cause show [sic],

IT IS HEREBY ORDERED that pursuant to Federal Rule of Civil Procedure 54(b), the Court directs entry of judgment on Defendant's compulsory counterclaim for Declaratory Relief.

IT IS FURTHER ORDERED that this Court's Order Denying Defendant's Motion for Summary Judgment and Granting the United Sates [sic] Motion for Summary Judgment On Constitutional Challenges, filed on November 8, 1993, is certified for review.

IT IS SO ORDERED:

DATE: 11/17/93 /s/ John S. Rhoades
JOHN S. RHOADES, SR.
UNITED STATES DISTRICT JUDGE

Copies to:

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APPENDIX C

UNITED STATES DISTRICT COURT

Southern District of California

THEODORE A. PINNOCK
Plaintiff,

V.

INTERNATIONAL HOUSE OF PANCAKES,
Defendant.

JUDGMENT IN A CIVIL CASE

(Filed Nov. 24, 1993)

CASE NUMBER: 92-1370-R

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that defendant's motion to certify the cross-claim for appeal under Rule 54(b) was granted on November 17, 1993. Judgment is issued in the cross-claim between defendant International House of Pancakes and the Department of Justice.

24 Nov 1993
Date

DON HENDRIX
Clerk

/s/ J. Klosterman
(By) Deputy Clerk

ENTERED ON 11/24/93

APPENDIX D

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Attorneys For Defendant and Counterclaimant INTERNATIONAL HOUSE OF PANCAKES FRANCHISEE, MAJID ZAHEDI

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THEODORE A. PINNOCK Plaintiffs, vs. INTERNATIONAL HOUSE OF PANCAKES FRANCHISEE, et al., Defendants.	CASE NO. 92-1370 R (CM) NOTICE OF APPEAL (Filed Nov. 23, 1993)
AND RELATED COUNTERACTIONS.	JUDGE: THE HONORABLE JOHN S. RHOADES COURTROOM: 5

NOTICE IS HEREBY GIVEN that defendant INTERNATIONAL HOUSE OF PANCAKES FRANCHISEE ("IHOP"), hereby appeals to the United States Court of Appeals for the Ninth Circuit from the court's November 8, 1993, order denying IHOP's motion for summary judgment and granting the United States' cross-motion for

summary judgment on Constitutional Challenges; judgment was entered on November 17, 1993, pursuant to Federal Rules of Civil Procedure 54(b).

Dated: November 19, 1993.

Respectfully Submitted,

LAW OFFICES OF
PETER D. LEPISCOPO

By: /s/ Peter D. Lepiscopo
Peter D. Lepiscopo,

Attorney for Defendant
and Counterclaimant

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THEODORE A. PINNOCK, Plaintiff/Appellee, and UNITED STATES OF AMERICA, Interventor/Appellee, vs. INTERNATIONAL HOUSE OF PANCAKES, et al., Defendants/Appellants.	No. 94-55030 DC# CV-92-1370-MLR Southern California (San Diego) ORDER (Filed Jan. 24, 1994)

The court is in receipt of Court Reporter Mindi Cochico's letter dated January 12, 1994. Within 14 days from the date of this order. Appellant shall file an ordering form with the district court and serve Reporter Colchico with a copy.

Appellants shall provide verification of compliance with this order within the above time frame. Failure to comply with this order in a timely fashion may subject this appeal to dismissal for failure to prosecute. Ninth Cir. R. 42-1.

The transcript shall be filed by March 9, 1994.

The briefing schedule is as follows: the opening brief and excerpts of record are due April 18, 1994, the answering brief is due May 18, 1994, and the optional reply brief is due 14 days from service of the answering brief.

This order shall be provided to the reporter at the district court.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

/s/ Mario Giscome
Mario Giscome
Deputy Clerk
Ninth Cir. R. 27-7/Appendix A,
General Orders for the
United States Court of
Appeals

APPENDIX F

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Attorneys For Defendant and Counterclaimant **INTERNATIONAL HOUSE OF PANCAKES FRANCHISEE, MAJID ZAHEDI**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THEODORE A. PINNOCK, Plaintiffs, vs. INTERNATIONAL HOUSE OF PANCAKES FRANCHISEE, et al., Defendants. AND RELATED COUNTERACTIONS.	**CASE NO. 92-1370 R (CM)** **SEPARATE STATEMENT OF UNCONTROVERTED MATERIAL FACTS** (Filed May 18, 1993) **HEARING DATE:** August 9, 1993 **HEARING TIME:** 10:30 a.m. **COURTROOM:** 5 **JUDGE:** THE HONORABLE JOHN S. RHOADES **COURTROOM:** 5

INTERNATIONAL HOUSE OF PANCAKES FRANCHISEE, MAJID ZAHEDI, (hereinafter referred to as "IHOP") hereby submits this Separate Statement of

Uncontroverted Material Facts, and evidence in support thereof, as follows.[1]

	IHOP'S UNCONTROVERTED MATERIAL FACT	SUPPORTING EVIDENCE
1.	IHOP is a restaurant.	Stipulate Facts, Fact #1.
2.	PINNOCK is an individual who resides in San Diego County.	Stipulated Facts, Fact #2.
3.	PINNOCK has physical disabilities, to wit: cerebral palsy, which substantially affects his ability to walk and speak.	Stipulated Facts, Fact #3.
4.	IHOP does business in San Diego County.	Stipulated Facts, Fact #4.
5.	IHOP is located at 5370 Kearny Mesa Road, San Diego, California 92111.	Stipulated Facts, Fact #5.
6.	IHOP's premises was in existence prior to enactment of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et. seq.[2]	Stipulated Facts, Fact #6.

---

[1] Plaintiff, Theodore A. Pinnock, shall hereinafter be referred to as "PINNOCK."

[2] The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et. seq., shall hereinafter be referred to as the **"ADA."**

7.	IHOP was in operation prior to enactment of the ADA.	Stipulated Facts, Fact #7.
8.	IHOP's facilities were built approximately twenty-five (25) years ago.	Decl. of Zahedi, ¶2.
9.	IHOP serves breakfast, lunch, and dinner.	Decl. of Zahedi, ¶2.
10.	Majid Zahedi is a sole proprietor doing business under the fictitious business name: IHOP.	Decl. of Zahedi, ¶1.
11.	On April 28, 1986, IHOP commenced business as a restaurant serving breakfast, lunch, and dinner.	Decl. of Zahedi, ¶2.
12.	Since IHOP commenced business it has had an average of 25 employees employed at any given time frame.	Decl. of Zhedi, ¶3
13.	At the present time, IHOP employs twenty-eight (28) employees: ten (10) tablewaiters, six (6) cooks, two (2) hostesses, four (4) busboys, four (4) dishwashers, and two (2) managers.	Decl. of Zahedi, ¶3.

14.	Three (3) of IHOP's employees have disabilities: one cook does not have use of his right hand and has been working for IHOP for approximately five (5) years; another employee has problems with physical seizures; and another cook is unable to read or write.	Decl. of Zahedi, ¶4.
15.	During all times complained of by Mr. Pinnock, IHOP's staff had been trained to assist anyone who has a disability, and trained to provide the assistance outlined below in facts **16, 17,** and **18.**	Decl. of Zahedi, ¶5.
16.	During all times complained of by Mr. Pinnock, IHOP did not have Braille menus but would provide an employee to read the menu to customers with sight or other disabilities.	Decl. of Zahedi, ¶5.
17.	During all times complained of by Mr. Pinnock, IHOP did not have automatic entrance doors but would have an employee open doors for persons with physical disabilities.	Decl. of Zahedi, ¶5.

18.	During all times complained of by Mr. Pinnock, IHOP's employees would rearrange tables in order to accommodate persons confined to wheelchairs.	Decl. of Zahdi, ¶5.
19.	During all times complained of by Mr. Pinnock, IHOP's parking lot had two (2) marked handicapped parking spaces.	Decl. of Zahedi, ¶6.
20.	During all times complained of by Mr. Pinnock, IHOP had a wheelchair ramp for access from parking lot.	Decl. of Zahedi, ¶6.
21.	During all times complained of by Mr. Pinnock, IHOP's front entrance had a double door, which provides access for persons confined to wheelchairs.	Decl. of Zahedi, ¶6.
22.	During all times complained of by Mr. Pinnock, IHOP's dining room was accessible to persons confined to wheelchairs.	Decl. of Zahedi, ¶6.
23.	During all times complained of by Mr. Pinnock, seeing eye dogs and other canines that assist disabled persons were permitted entry to IHOP's premises.	Decl. of Zahedi, ¶6.

24.	During all time complained of by Mr. Pinnock, IHOP's bathrooms had grab bars but were not accessible to persons confined to wheelchairs.	Decl. of Zahedi, ¶6.
25.	In order to ascertain how much it would cost to implement the modifications requested by Mr. Pinnock, Mr. Zahedi procured bid estimates from Dan Souza.	Decl. of Zahedi, ¶7.
26.	Dan Souza is a sole proprietor who is doing business under the fictitious business name: "Souza & Souza."	Decl. of Souza, ¶1.
27.	Dan Souza is a licensed California contractor.	Decl. of Souza, ¶2.
28.	Dan Souza is familiar with the Americans with Disabilities Act Accessibility Guidelines For Buildings and Facilities ("ADA Guidelines").	Decl. of Souza, ¶3.
29.	Dan Souza has built new facilities and modified existing facilities to comply with ADA Guidelines.	Decl. of Souza, ¶3.

30.	In February, 1993, Dan Souza inspected the IHOP premises in order to ascertain what modification would be needed in order to comply with Part 4.23 of the ADA Guidelines.	Decl. of Souza, ¶4.
31.	Dan Souza determined that there are two alternative modifications that can be made to IHOP's existing facility in order to comply with Part 4.23 of the ADA Gudelines.	Decl. of Souza, ¶5.
32.	One modification would entail moving to another location an office that lies between the bathrooms for men and woman. This modification would cost **$32,500.** This bid is for mininmum [sic] construction items only. because the IHOP facility is a very old building, the costs could increase.	Decl. of Souza, ¶¶5 and 7; Decl. of Zahedi, ¶7; Exhibit 1 to Decl. of Souza.
33.	The other modification would entail keeping the office between the two bathrooms in place but extending the walls in both bathrooms. This modification would cost **$104,580.**	Decl. of Souza, ¶¶5 and 7; Decl. of Zahedi, ¶7; Exhibit 2 to Decl. of Souza.

34.	One consequence of modifying an existing facility is that it triggers compliance with all local and state building and health codes that were adopted *after* an existing facility was built.	Decl. of Souza, ¶6.
35.	The modification mentioned above in Fact 33 would cause IHOP to lose approximately 140 square feet of dining room and work area space, which would cause IHOP to lose approximately twenty seating places for customers.	Decl. of Zahedi, ¶8; Decl. of Souza, ¶8; Exhibit 2 to Decl. of Souza.
36.	During all times complained of by Mr. Pinnock, all products (i.e., eggs, meat, bread, milk, etc.) that were served in my IHOP were purchased within the state of California, to wit: in San Diego and Los Angeles counties.	Decl. of Zahedi, ¶9.

Dated: May 17, 1993.

Respectfully Submitted,

LAW OFFICES OF
PETER D. LEPISCOPO

By: /s/ Peter D. Lepiscop
Peter D. Lepiscopo,

Attorney for Defendant
and Counterclaimant

APPENDIX G

Constitutional and Statutory
Provisions Involved

CONSTITUTION:

Article I, Sec. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Sec. 8. The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .

Article II, Sec. 1. The executive Power shall be vested in a President of the United States of America.

Article III, Sec. 1. The judicial Power of the United States shall be vested in one supreme Court, and in such other inferior Courts as the Congress may from time to time ordain and establish.

BILL OF RIGHTS:

Amendment V. No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

RELEVANT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT OF 1990:

§12101(a) The Congress finds that some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.

§12101(b)(1) It is the purpose of this Act to provide for a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.

§12101(b)(4) It is the purpose of this Act to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce . . .

§12111(10) Undue hardship. (A) In general. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include –

(i) the nature and cost of the action needed under this Act;

(ii) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the work-force of such entity; the geographic separateness, administrative or fiscal relationship of the facility in question to the covered entity.

§12181(1) The term "commerce" means travel, trade, traffic, commerce, transportation, or communication –

(A) among the several States;

(B) between any foreign country or any territory or possession and any State; or

(C) between points in the same State but through another State or foreign country.

§12181(7) Public accommodations. The following private entities are considered public accommodations for purposes of this title, if the operation of such entities affect commerce –

(7) a restaurant . . .

§12181(9) Readily achievable. The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include –

(A) the nature and cost of the action needed under this Act;

(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility in question to the covered entity.

§12182(a) General Rule. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

§12182(b)(1)(A) (i) Denial of participation. It shall be discriminatory to subject an individual or class

of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

§12182(b)(1)(B) Integrated settings. Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

§12182(b)(1)(C) Opportunity to participate. Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

§12182(b)(2) Specific prohibitions. Discrimination includes –

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the

nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities . . . where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

§12186(b) Regulations. Not later than 1 year after the date of the enactment of this Act, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this title not referred to in subsection (a) that include standards applicable to facilities . . . covered by §12182.

§12188 Enforcement.

(a)(1) Availability of remedies and procedures. The remedies and procedures set forth in 42 U.S.C. 2000a-3(a) are the remedies and procedures this title provides to any person who is being subjected to discrimination on the basis of disability in violation of this title or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of §12183.

(a)(2) Injunctive relief. In the case of violations of sections 12182(b)(2)(A)(iv), injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this title. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this title.

(b)(2)(B) may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved . . .

(b)(2)(C) may, to vindicate the public interest, assess a civil penalty against an entity in an amount –

(i) not exceeding $50,000 for a first violation; and

(ii) not exceeding $100,000 for any subsequent violation.

§12205 Attorney's fees. In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, reasonable attorney's fees, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.